No. 15336

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division.

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

Rules

Statutes

No. 15336

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH ORBY SMITH, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

1956 APPEAL.

Note: For convenience this Brief is being divided into two sections, the first covering the 1956 appeal and the second covering the 1957 appeal.

I.

Jurisdiction and Statement of the Case.

The Government accepts the Jurisdictional Statement and Statement of the Case made by appellant insofar as the 1956 appeal is concerned.

II.

Argument.

Federal Sentence Could Not Be Concurrent With State Sentence Under Law.

We are indebted to appellant for quoting from Title 18, United States Code, Section 3568 (Appellant's Br. p. 12). It clearly indicates that a sentence shall not begin to run until the convicted person is received at, or is awaiting transportation to, the place designated for service of sentence with the Attorney General. Appellant then *speculates* that Title 18, United States Code, Section 4082, could have been the basis for service of a portion of the sentence in that the Attorney General has power to designate state prisons for service of sentence. Appellant *cites no evidence* that such was the case. There is none in the record because no such designation was made.

The appellant admits that he was in state custody, produced for prosecution by virtue of a writ, that he was returned to state custody after trial, and that he was then serving a state sentence of five years to life (Appellant's Br. p. 2). He was *taken into federal custody* on September 23, 1952 (Appellant's Br. p. 3). That is the date on which he commenced to serve his sentence in accordance with Section 3568.

The judge of the trial court must be taken to be cognizant of his own files, and thus to be aware that appellant was in the state custody, and present in court pursuant to the writ of habeas corpus *ad prosequendum*. This did not require him to state in his Judgment of conviction

that the sentence was *consecutive* to the existing state sentence since Section 3568 specifically provides, after indicating sentence is effective when custody of the convicted person is received, as follows:

> "No sentence shall prescribe any other method of computing the term."

Vanover v. Cox (8 Cir., 1943), 136 F. 2d 442, 443, cert. den. 320 U. S. 779;

Hayden v. Warden (9 Cir., 1941), 124 F. 2d 514, 515.

Appellant's arguments to the contrary (Appellant's Br. p. 12) are contrary to the federal law cited *supra*. The cases he cites for the proposition that the *state and federal* sentences must be deemed concurrent are inapposite, since they all involved two *federal* sentences. His criticism of the law is unacceptable since it clearly and definitely provides when the sentence commences to run. Nothing is left to "dangle indefinitely."

Thus the 1956 Motion of appellant was properly denied by the trial court. On that Motion, as presented, the trial court was quite proper in opining, "There is simply nothing to correct" [1956 R. ca. 15].

United States v. Raymond, 218 F. 2d 952;

United States v. Rivera, 224 F. 2d 88, 89;

Harrell v. Shuttleworth, 200 F. 2d 491;

Booth v. United States, 209 F. 2d 183, 184;

United States v. Tacoma, 199 F. 2d 482, 483;

Mahoney v. Johnston (9 Cir., 1944), 144 F. 2d 663, cert. den. 324 U. S. 853.

1957 APPEAL.

I.

Jurisdictional Statement.

The jurisdiction of the District Court is founded upon Section 3231, Title 18, United States Code. The petition to vacate the original judgment was made by appellant under Section 2255, Title 28, United States Code. The jurisdiction of the Court of Appeals to entertain this matter may be found under the provisions of Section 1291, Title 28, United States Code, and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

II.

Supplemental Statement of Facts.

On March 15, 1957, appellant filed his "Motion to Vacate Judgment of Conviction and Sentence" [Tr. 1957, p. 4]. In that document, under the heading "Relief Requested," appellant asked for all of the following:

1. Court Order for the appearance of one Ray E. Potts, attorney, Los Angeles, California.
2. *Subpoenas duces tecum* for medical and psychiatric records to the following:
   a. Garfield Park Hospital, Chicago, Illinois (1942).
   b. California Shipyards, Wilmington, California (1943).
   c. San Quentin Prison, San Quentin, California (1943-7).
   d. Folsom Prison, Represa, California (1943-7).
3. Subpoenaes to all of the following:
   a. Dr. David Cohen, Veterans Administration Hospital, Coatesville, Pa.

b. Dr. Joseph J. Peters, Philadelphia, Pa.
c. Dr. Ray J. Simmonds, Sacramento, Calif.
d. Dr. David G. Schmidt, San Quentin, California.
e. Dr. Corbett H. Thigpen, Georgia.
f. Dr. Hervey Cleckley, Georgia.
g. Clinton T. Duffy, California Adult Authority, San Quentin, California.
h. Cameron L. Lillie, Esq., Los Angeles, California.
i. The F.B.I. agent who testified at trial (name not given).
j. Edward C. Freutal, Esq., Los Angeles, California.

The Motion included an affidavit that appellant is an indigent person. It alleges in general terms that appellant was insane prior to and at the time of the commission of the offense and at time of trial, that his court-appointed attorney was inexperienced and thus that appellant was denied the effective assistance of counsel guaranteed him by the Constitution, that the trial court conspired with the United States Attorney to suppress evidence favorable to appellant, and that the United States Attorney knowingly used perjured testimony in violation of appellant's constitutional rights. No affidavits were attached to the Motion to support the appellant's claims as to proposed testimony of the above-identified witnesses. No detailed or factual offer of proof was made so that it could be determined whether the proffered evidence would be material to the requested hearing.

III.

Argument.

A. Appellant's Showing Is Inadequate to Require Consideration.

Appellant is an indigent person, or so claims to be. His 1957 Motion requests the issuance by the trial court of numerous subpoenas to persons at a great distance from the court. The purport of his efforts is to show that he was insane in 1947 when he committed the offense for which he is now incarcerated, and that his counsel was so inexperienced that he did not present the insanity defense at the trial. Parenthetically it should be noted that he was represented by other and different counsel on his motion for new trial and on his appeal, both of which were unsuccessful. He would put the Government to great expense on the basis of generalized assertions, and without any indication whatsoever that the testimony which he claims would be forthcoming is in fact available. While this is a civil action, in effect, it arises out of a criminal conviction affirmed on appeal by this Honorable Court. At the very least, before the Government should be put to the expense of assembling all of the requested witnesses, the burden should be placed on appellant to show that there is some merit to his assertions.

Cf. Rule 17(b), Federal Rules of Criminal Procedure, which requires an indigent defendant to make a showing by proper affidavit before a court is required to issue subpoenas on his behalf. He is also required under that rule to show the materiality of the testimony which he expects from said witnesses.

B. Appellant Smith Was Afforded That Degree of Representation by Counsel Guaranteed Him Under the Sixth Amendment.

Appellant Smith's complaints against the manner in which his case was handled by appointed counsel are peculiarly susceptible to the language of Judge Denman in *Latimer v. Cranor* (9 Cir., 1954), 214 F. 2d 926, 929:

> "The application alleges that Latimer's attorney mishandled his case.
>
> "This is a frequent contention of unsuccessful defendants. There are no allegations showing the attorney's conduct was so incompetent that it made the case a farce requiring the Court to intervene in his client's behalf. We find no denial of the efficient representation of the Constitution."

Generally, it may be said that the Constitution does not guarantee that appointed counsel shall measure up to the notions or standards of ability or competency of the accused. It is enough that the trial court appoints a qualified attorney to represent the defendant and that the attorney appears, advises and represents the defendant at all stages of the proceedings.

See:

Losieau v. United States (8 Cir., 1949), 177 F. 2d 919;

Connolly v. Cox (8 Cir.), 138 F. 2d 786;

United States v. Regen (7 Cir., 1948), 166 F. 2d 976;

Moss v. Hunter (10 Cir., 1948), 167 F. 2d 683;

Soulia v. O'Brien (1950), 94 Fed. Supp. 764, 770;

Merritt v. Hunter (10 Cir., 1948), 170 F. 2d 739;

United States v. Wight (2 Cir., 1949), 176 F. 2d 376, 379;

Sheppard v. Hunter (10 Cir., 1947), 163 F. 2d 872, 873;

Williams v. United States (4 Cir., 1954), 218 F. 2d 276, 279;

Hayman v. United States (9 Cir., 1953), 205 F. 2d 891, 894, and authority collected in Note 2, p. 895;

United States ex rel. Thompson v. Die (1952), 103 Fed. Supp. 776.

C. Appellant Smith May Not Use Proceedings Under 28 U. S. C. A., Section 2255, to Relitigate Issues Properly Raised by Appeal on the Merits.

From a reading of appellant's petition in this proceeding, it is apparent that he attempts to tardily raise, by means of petition under Section 2255 *(supra)*, matters properly raised if at all upon his trial. Thus, for instance, he seeks now to have a determination made of his sanity and he desires an inquiry into the status of certain Government witnesses called at the trial. Both of such grounds are properly cognizable only at the trial, and should have been raised at that time. Of interest in this connection is the language of the Fourth Circuit in the recent case of *Banghart v. United States* (4 Cir., 1953), 208 F. 2d 902:

> "A motion under 28 U. S. C. A. §2255 is proper only where the judgment under which a prisoner is confined is subject to collateral attack. It may not be used in lieu of appeal to review questions which were raised or *should have been raised upon the trial.*" (Emphasis added.)

See also:

Hastings v. United States (9 Cir., 1950), 184 F. 2d 939;

Hurst v. United States (10 Cir., 1949), 177 F. 2d 894;

Hill v. United States (6 Cir., 1955), 223 F. 2d 699;

Davis v. United States (7 Cir., 1954), 214 F. 2d 594;

United States v. Rutkin (3 Cir., 1954), 212 F. 2d 641;

Goss v. United States (6 Cir., 1949), 179 F. 2d 706;

Storey v. United States (8 Cir., 1949), 174 F. 2d 120.

D. The Instant Motion Is Insufficient to Bring the Question of Appellant's Sanity at the Time of the Trial Before This Honorable Court.

Appellant alleges that the instant Motion is brought as a writ of error *coram nobis,* a writ which was abolished by the 1948 Criminal Codification, but to some extent reactivated under the all writ's section by the decision of the Supreme Court in *United States v. Morgan,* 346 U. S. 502. It is perhaps more correct to say that in its attempted usage, the Motion here presents a petition in the nature of a writ of *coram vobis* rather than a writ of *coram nobis.* (*United States v. Right* (D. C. E. D. Ill., 1944), 56 Fed. Supp. 489, 492.) However, in any event, on the present showing of the petition the appellant is not entitled to a writ of *coram nobis,* inasmuch as that writ lies solely to view errors of fact extrinsic of the record which were not brought to the trial court's attention and that failure

being in no way imputable to the appellant. As stated in *In re Dyer* (1948), 193 F. 2d 69, 72:

> "Whatever may be said about the inception of the writ, the recognized present purpose is to correct an error of fact which was unrecognized prior to the final disposition of the proceeding. It is not intended as a means of revising findings based on known facts *or facts that should have been known by the exercise of ordinary and reasonable diligence.*"

See also:

State v. Woodward (1945), 160 P. 2d 432;

People v. Butterfield (1940), 99 P. 2d 310;

City of St. Louis v. Franklin Bank, et al., 173 S. W. 2d 837, 847;

People v. Mooney (1918), 174 Pac. 325,

cited with approval by the United States Court of Appeals for the Ninth Circuit in

Audette v. United States (9 Cir., 1938), 99 F. 2d 113.

Additionally, for background material, see cases collected at page 63 in the Syllabus in the case of *United States v. Myer,* 235 U. S. 55.

E. Appellant Must Make Facts Showing to Be Entitled to Hearing on Allegations as to the Knowing Use of Perjured Testimony.

> "A criminal conviction procured by the use of testimony known by the prosecuting authorities to be perjured, and knowingly used by them in order to procure a conviction, is of course not in compliance with due process of law, and is violative of a defendant's constitutional rights. (Cases cited.) But a defendant

has the *burden of making a showing,* not only that material perjured testimony was used to convict him, but that it was knowingly and intentionally used by the prosecuting authorities in order to do so.

"But trivial conflicts in testimony . . . do not constitute perjury.

"In order to obtain a hearing under Section 2255, a petitioner must make a *more substantial showing* than merely charging perjury and making the *unsupported claim* that perjured testimony was knowingly used by the prosecuting authorities.

"Appellant's petition is replete with conclusions that many of the witnesses at the trial committed perjury, but he fails to aver the existence of facts to support such conclusions. His unsupported broad charges will not suffice. In *United States v. Sturm* (7 Cir.), 180 F. 2d 413, 414, we said, 'Just as a petition for a writ of habeas corpus . . . must set forth the facts as distinguished from mere conclusions . . . (citing cases) so, it would seem clear, must such a motion as that authorized by Section 2255 . . .'" (Emphasis added.)

United States v. Spadafora (7 Cir., 1952), 200 F. 2d 140, 142, 143.

Likewise, no such showing was made in the instant case by appellant. In addition he had a trial, was represented by counsel throughout, who had the opportunity to cross-examine the witnesses, and he took an unsuccessful appeal. His motion for new trial included a claim of perjured testimony as to a witness Patrick, but that motion was rejected. The witness Jobe, contrary to appellant's contentions, was not a key or principal witness in the prosecution's case. An examination of the record

reveals that his testimony went only to corroborate more damaging evidence of defendant's participation.

Appellant has not sustained the heavy burden which is placed on him in a collateral attack on the affirmed judgment of conviction. (*Bishop v. United States* (D. C. Cir., 1955), 223 F. 2d 582, cert. gtd. other grounds, 350 U. S. 961.) Hence, appellant is not in the position to claim that he should have had a hearing on the allegation of knowing use of perjured testimony.

F. Insanity at the Time of the Commission of a Crime Is a Defense Which Should Not Be Presented Upon Motion Under Section 2255.

The issue of insanity as a defense is presentable upon the trial and appealable if error has been made in respect to it. A motion to vacate under Section 2255 cannot be used as a substitute for an appeal.

> *Smith v. United States* (D. C. Cir., 1950), 187 F. 2d 192, cert. den. 341 U. S. 927.

Thus, an alleged insanity at the time of the commission of the crime cannot be used as a basis for a motion under Section 2255.

See:

> *Rolfe v. Lloyd* (9 Cir., 1939), 102 F. 2d 606;
>
> *Hall v. Johnston* (9 Cir., 1936), 86 F. 2d 820;
>
> *Byrd v. Pescor* (8 Cir., 1947), 163 F. 2d 775, cert. den. (1948), 333 U. S. 846.

G. Insanity at the Time of Trial Under Section 2255.

Here the question is whether at the time of trial appellant was mentally competent to understand the proceedings against him and properly to assist in his own defense.

There appears to be a division among the Circuits upon whether the question can be raised by a motion under Section 2255.

Forthoffer v. Swope (9 Cir., 1939), 103 F. 2d 707;

Hahn v. United States (10 Cir., 1949), 178 F. 2d 11;

McMahon v. Hunter (10 Cir., 1945), 150 F. 2d 498, cert. den. 326 U. S. 783;

Ashley v. Pescor (8 Cir., 1945), 147 F. 2d 318;

McIntosh v. Pescor (6 Cir., 1949), 175 F. 2d 95.

But see: *Bishop v. United States,* 350 U. S. 961, in which the Supreme Court of the United States granted certiorari, and remanded the case to the District Court for sanity hearing without other comment.

In *Forthoffer, supra,* this Circuit emphasized, at page 710, that the burden is on the petitioner to offer facts which would justify a court of the United States in setting aside a judgment of another court of the United States, a thing not lightly to be undertaken. There the petitioner had waived trial and pled guilty.

By analogy, where, as here, the court is being asked to set aside its own judgment on alleged grounds *dehors* the record, the burden of proof must be on the moving party *to offer facts,* not mere *conclusions,* which would warrant the trial court in setting a full scale hearing; Such was not done in this case. Furthermore, the trial judge saw the defendant in court and while he was on the stand as a witness, and therefore had an opportunity to judge for himself whether or not the defendant was sane at the time of trial. No presentation of the alleged insanity at time of trial was made either by defense counsel at the trial, or at any stage of the motion for new trial

or appeal which followed. Therefore, all we have are the allegations of the appellant at this time that he was then insane.

> "The District Judge would not have been warranted in conducting a hearing to determine whether the judgment should be set aside on any such vague allegations, particularly in a case where the petitioner had been represented on the trial by counsel and the proceedings against him had been reviewed on a motion for new trial and on appeal to this court."
>
> *Sanders v. United States* (4 Cir., 1950), 183 F. 2d 748, 749, cert. den. 340 U. S. 921.

It is incumbent upon appellant to make some showing which would overcome the presumption of regularity which attends the judgment of a court when a collateral attack is made on it.

> *Forthoffer v. Swope* (9 Cir., 1939), 103 F. 2d 707, 711;
>
> *McKinney v. United States* (D. C. Cir., 1953), 208 F. 2d 844, 847;
>
> *Johnson v. Zerbst* (1938), 304 U. S. 458, 468.

H. The Findings of Fact and Conclusions of Law Are Supported by Evidence.

The findings [1957 R. 20] show that they were based on the records and files of the cause. Appellant admits that he was convicted after jury trial (Appellant's Br. p. 2); that, represented by different counsel, he did appeal (173 F. 2d 181, 9 Cir., 1949); that this Honorable Court affirmed the conviction (Appellant's Br. p. 3); and that one of the grounds of appeal was insufficiency of the evidence (Appellant's Br. p. 3). Inherent in this situation is that a reporter's transcript was prepared and filed. This,

and the Clerk's Record of Proceedings, constitute the records and files upon which the Court properly relied in determining the issues raised by appellant.

Whether or not appellant was ably represented at the trial by counsel is a matter more easily determined by observing actions than by hindsight in examining a record. Therefore the trial judge was eminently qualified to make a finding as to the quality of the representation given defendent at the trial. He had a record from which to refresh his memory as to the events of the trial.

Also, as indicated heretofore in this brief, the very assertions of appellant as to an alleged conspiracy of the United States Attorney to convict defendant by the use of perjured testimony and as to his mental incomptency at the time of trial were too broad to require the District Court to entertain a hearing in respect to these items. There was no evidence before the court on such matters, and therefore the findings of the court as to the lack of such evidence were proper.

Furthermore, since the defendant was present in the court during all stages of the trial, it is clear that the court had jurisdiction of his person at the time of trial.

The conclusions of law properly follow from the findings of fact which precede them, and are supported by said findings.

The appellant has not pointed out in any respect where the findings of fact are in error except for the allegation that there was no evidence to support them. He then states they are clearly erroneous (Appellant's Br. p. 10). This is not true because the files on record, including the transcript of the trial, were before the court. The rules of

this circuit require the appellant to specify wherein the findings of fact are in error. Rule 18(2)(d) provides:

> "In all cases when findings are specified as error, the specifications shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

The objections offered herein are inadequate to comply with this rule, and for that reason are not further considered.

Conclusion.

1. The 1956 appeal is without merit because the federal sentence could not be concurrent with the state sentence under existing law.

2. The 1957 appeal should be denied because the appellant has not made any substantial showing to base his unsupported claims regarding the knowing use of perjured testimony, his insanity at the time of the commission of the crime and at the time of the trial, nor as to the alleged lack of the effective assistance of counsel.

3. The findings of fact and conclusions of law made by the trial court upon the hearing of the Motion under Section 2255 in 1957 are adequately supported by the records and files in this cause. Wherefore, appellee respectfully prays that the appeals be denied.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division.

Attorneys for Appellee.